SUPREME COURT, U. S.

AUG 23 1967

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 532

E. B. WELCH,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

HUGH B. MILLER,
MARTIN J. JARVIS,
EUGENE A. BRODSKY,
JARVIS, MILLER & STENDER,
123 Second Street,
San Francisco, California 94105,
Counsel for Petitioner.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled matter on April 21, 1967. A petition for rehearing by this petitioner was denied on May 26, 1967.

CITATIONS TO OPINIONS BELOW

The findings and judgment of the District Court for the Northern District of California are not re-

ported. They are printed in Appendix "A" hereto, *infra,* pp. i-x, and may be found in the record at R. I, 41-50.[1]

The opinion of the Court of Appeals for the Ninth Circuit (R. I, 64-69) is printed in Appendix "B" hereto, *infra,* p. xi, and is reported at 377 F. 2d 501.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on April 21, 1967 (R. I, 70) and is printed in Appendix "B" hereto, *infra,* p. xx. A petition for rehearing was filed by this petitioner on May 19, 1967 and was denied on May 26, 1967. (R. I, 71.) The order denying a rehearing is printed in Appendix "B" hereto, *infra,* p. xx. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTES AND RULES INVOLVED

Petitioner proceeds under the General Maritime Law of the United States as set forth in the United States Constitution, Article III, Section 2. In addition, the Jones Act (46 U.S.C. § 688, et seq.) is also involved.

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[1]The record in this case consists of 3 volumes and various exhibits as certified and transmitted by the Court of Appeals. References to the numbered volumes are by volume and page, e.g. (R. I, 17). Two depositions, those of Pak and Goodheim, were introduced into evidence at the trial without reading them in open court and are referred to by deponent and page, e.g. (Pak 33). All other exhibits are referred to by their original designations, e.g. (Resp. Exh. B).

STATEMENT

The facts are as stated in the opinion of the Court of Appeals, except that no help or assistance was available to aid petitioner had he requested help in connection with the assigned task.[2] The following facts from the opinion of the Court of Appeals are a necessary predicate in considering this petition.

A standby lube oil pump on board respondent's ship was not operating properly. Petitioner, the ship's Third Assistant Engineer, was ordered by his superior officer (the First Assistant Engineer) to dismantle the pump and make the necessary repairs. Repairing the pump required removing its two pistons and cross-head and transporting these parts from the lower engine room up a ladder a considerable distance to the ship's machine shop. Each piston weighed over 100 lbs.; the cross-head weighed 42 lbs. The operation of dismantling the pump and carrying each piston and the cross-head to the machine shop is a two man job. One of the ship's oilers had been initially assigned to help petitioner with dismantling the pump on the morning of the date of the accident. However, at noon his watch was finished and the oiler left the job. After lunch petitioner returned to the work. He was not provided with a substitute helper and was left to transport the parts from the pump to

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[2]The fact that there was no help or assistance available to aid petitioner was pointed out in his briefs to the Court below, where *all* the evidence on this issue with record references was set forth verbatim; the lack of available help and the reasons therefore was again pointed out in the Seaman's petition for rehearing. (See: Appendix "C", *infra*, pp. xxi-xxvi).

the machine shop unassisted and to complete the job alone.

There was in fact no help (men) available or at hand to aid petitioner in the ordered task.[2] After transporting each of the pistons up to the machine shop and back down to the disabled pump, petitioner sustained permanent injury to his spine in the course of lifting and carrying the cross-head from the pump to the machine shop unassisted.

The District Court, sitting in admiralty, found respondent's vessel unseaworthy by reason of respondent's failure to provide petitioner with sufficient men (the additional man along with petitioner) to perform the required task.[3] The District Judge found and assessed damages in the total sum of $38,450.00 as a direct result of the unseaworthiness of the ship.

But the District Court also found petitioner guilty of contributory negligence on the sole basis of his failure to request additional help of his superiors to aid him in the assigned task and determined that petitioner's negligence in that regard contributed fifty (50%) percent to the accident and the consequences to him. The District Court then divided damages by fifty (50%) percent and awarded petitioner one-half the amount of the total damages assessed.

Each party appealed the decision of the District Court. The Court of Appeals affirmed the judgment of the District Court. Petitions by both parties for

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[3]See: *Waldron v. Moore-McCormack Lines, Inc.* (1967) 386 U.S. 724, 87 S.Ct. 1410, 18 L.ed.2d 482; *American President Lines, Ltd. v. Redfern* (9th Cir., 1965) 345 F.2d 629.

a rehearing in the Court of Appeals were denied on May 26, 1967.

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals with regard to the issue of contributory fault alone.

QUESTIONS PRESENTED

1. Whether the District Court clearly erred in finding the petitioner-seaman guilty of contributory negligence on the sole basis of his failure to request additional help, when his superior aboard ship ordered him to do a two-man job and the respondent-employer failed to supply him with the extra man resulting in injury to the seaman when acting in obedience to his orders while performing the assigned task alone.

Alternative Statement of Question No. 1

Given:

(a) A two-man job aboard ship.

(b) The shipowner's absolute, continuing and non-delegable duty under maritime law to provide the necessary wherewithall for the assigned task.

(c) The seaman's absolute and continuing duty to promptly obey all lawful orders of his superior officers aboard ship.

Question: Does obedience to orders of a superior officer constitute contributory negligence on the part of a seaman, where the shipowner

fails to continuously provide the extra man for a two-man job and the seaman, in obedience to orders and without complaint or request for additional help, is injured while working unassisted on the ordered task.

2. Whether the District Court clearly erred in finding the petitioner-seaman guilty of contributory negligence on the sole basis of his failure to request additional help **(no help or assistance in fact being available or at hand)**, when his superior aboard ship ordered him to do a two-man job, and the respondent-employer failed to supply him with the extra man, resulting in injury to the seaman when acting in obedience to his orders while performing the assigned task alone.

Alternative Statement of Question No. 2

Whether negligence on the part of an injured seaman must contribute directly to the occurrence of an accident before the rules of comparative negligence and divided damages are applied in maritime cases?

3. Do the rules of comparative fault and divided damages apply where liability for personal injuries to a seaman is based on the shipowner's breach of the warranty of seaworthiness?

Alternative Statement of Question No. 3

Whether the defense of contributory negligence is properly available to reduce a seaman's damages caused by unseaworthiness?

REASONS FOR GRANTING A WRIT

1. The decision of the Court of Appeals for the Ninth Circuit (Appendix "B," *infra,* p. xi) is in conflict with the decision of the Fifth Circuit Court of Appeals in *Cox v. Esso Shipping Co.* (5th Cir. 1957) 247 F. 2d 629. It also conflicts with the decision of this Court in *Michalic v. Cleveland Tankers, Inc.* (1960) 364 U.S. 325, 81 S. Ct. 6, 5 L. Ed. 2d 20.

In *Cox, supra,* as here, where the seaman was acting in obedience to orders (and the wherewithall to carry out the orders was not supplied by the shipowner), it was held that the shipowner's dereliction of duty cannot be turned into a fault on the part of the seaman under the guise of contributory negligence. Similarly this Court, in quoting from the *Cox* case in *Michalic, supra,* affirmed the proposition that dereliction of duty on the part of the shipowner, where the injured seaman is acting under orders of his superior, cannot be turned into a fault on the part of the seaman under the guise of contributory fault.

This decision of the Ninth Circuit Court of Appeals, if allowed to stand, is in direct conflict with *Michalic* and *Cox, supra,* and is also contrary to the policy of the federal law in seamen's cases. Where a seaman is acting in obedience to orders of his supe-

rior and there is no safe alternative provided by the shipowner, he cannot be guilty of contributory negligence in performing the ordered task with the wherewithall furnished him at hand. The seaman has no choice but to obey all lawful orders of his superiors aboard his ship.

The decision of the Court of Appeals for the Ninth Circuit is also in conflict with two decisions of the Fourth Circuit Court of Appeals in *Ballwanz v. Isthmian Lines, Inc.* (4th Cir. 1963) 319 F. 2d 457 and *Smith v. United States* (4th Cir. 1964) 336 F. 2d 165.

In *Ballwanz, supra,* it was held reversible error for the trial judge to have instructed the jurors that they might take into consideration the plaintiff's failure to complain or to demand additional material to make the equipment better suited for the purpose for which it was being used (319 F. 2d 457, at 461-462). There, as here, there was no duty and hence no contributory negligence on the part of the injured seaman who failed to request help or seek out the wherewithall to perform the designated task.

In *Smith, supra,* the Fourth Circuit Court of Appeals held (a) that it was the duty of the shipowner to provide the wherewithall in connection with an assigned task; (b) any attempt to shift this duty to the injured workman under the guise of contributory negligence is contrary to the maritime law; and further, (c) that actual knowledge of the defective condition by the injured workman where no safe alternative is shown, does not justify a finding of contribu-

tory negligence against him, for such a finding would be tantamount to holding that he assumed the risk of the defective condition and "he may not be charged with 'assumption of the risk under another name' ".[4]

In the instant case the failure of petitioner to request help—where no help was in fact available—cannot be the predicate for a finding of contributory negligence not only on the ground of lack of causal connection between petitioner's omission and the occurrence of the accident, but also because it would be tantamount to holding that petitioner assumed the risk created by his employer's dereliction of duty, where no safe alternative was provided him by his employer.[5]

2. The decision of the Court of Appeals for the Ninth Circuit (Appendix "B," *infra,* p. xi) is in conflict with the decision of the Third Circuit Court of Appeals in *Sizemore v. United States Lines Co.* (3rd Cir., 1963), 323 F. 2d 774, affirming 213 F. Supp. 76, 81-83 (E.D. Pa., 1962).

In *Sizemore, supra,* as here, the suit involved injury to a merchant seaman aboard his ship where the claim was based on unseaworthiness. The trial judge held that before the rules of comparative negligence and divided damages could apply, the shipowner was bur-

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[4]See: *Palermo v. Luckenbach Steamship Co.,* 355 U.S. 20, 78 S. Ct. 1, 2 L. Ed. 2d 3 (1957);
Socony Vacuum Oil Co. v. Smith, 305 U.S. 424, 432, 59 S. Ct. 262, 83 L. Ed. 265 (1939).

[5]See: *San Pedro Compania Armadoras, S.A. v. Yannacopoulos,* 357 F. 2d 737 (5th Cir., 1966).

dened to show direct causal connection between the conduct of the injured seaman and the resultant accident. In *Sizemore, supra,* the Court of Appeals for the Third Circuit affirmed, upholding the view of the trial judge that at least a direct and substantial connection between the injured worker's dereliction and the resultant accident must be shown by the employer before the employee's negligence can be held to be contributory and his damages reduced.

> ". . . A review of the common law indicates that the plaintiff's act or omission must at least *contribute directly* to his harm in order to constitute contributory negligence." (213 F. Supp. at p. 83.) (Emphasis supplied.)

The Ninth Circuit Court of Appeals appears to have blurred, if not destroyed, this distinction in its opinion. Where, as here, help was not shown to be available,[6] the dereliction of duty on the injured worker's part (omission to request additional help) was not causally connected to the occurrence as a matter of law.

3. The decision of the Ninth Circuit Court of Appeals (Appendix "B," *infra,* p. xi) is in conflict with the decisions of the Courts of Appeals for both the Third Circuit and the Fifth Circuit in recent breach of warranty decisions arising out of the cigarette-cancer cases which hold that a plea of contributory

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[6]On this issue, the burden of proof was clearly on respondent and not petitioner. See: *Mason v. Mathieson Tanker Industries, Inc.*, 298 F. 2d 28 (4th Cir.), cert. denied 371 U.S. 828, 83 S. Ct. 23, 9 L. Ed. 2d 66 (1962).

negligence is obviously inapplicable to a claim based on breach of implied warranty.

See: *Pritchard v. Liggett & Meyers Tobacco Co.* (3rd Cir., 1965) 350 F. 2d 479, *modified* 370 F. 2d 95;

Green v. American Tobacco Co., 325 F. 2d 673 (5th Cir., 1963).

Breach of the warranty of seaworthiness should be treated as breach of any other warranty. The Court of Appeals for the Ninth Circuit has confused a tort concept (contributory negligence) with a doctrine *ex contractu* in nature (Cf: *The Osceola*, 189 U.S. 158 (1903)). The very definition of the duty to provide a seaworthy ship precludes the application of contributory negligence where injury is caused by unseaworthiness.

4. The questions presented are of cardinal importance in maritime cases and of far reaching importance in the law of the employer-employee relationship, in that the decision of the Ninth Circuit Court of Appeals is believed to be erroneous and conflicting with the common law applicable to the relationship of master and servant ashore.

The rule at common law in the employer-employee relationship holds that the employee who is given direct orders by his superior must obey—unless there is obvious and imminent peril to life or limb. Indeed, the applicable common law rule was set forth as follows in an earlier decision of the Court of Appeals for the Ninth Circuit:

See: *Atchison, T. & S. Fe Ry. Co. v. Seamas* (9th Cir., 1952) 201 F. 2d 140 at p. 144:

> "The long-settled common law rule is that where an employee acts in obedience to a direct order of his principal or a vice-principal, he is not negligent unless the danger is so glaring and imminent that no reasonable person would incur it, even under orders. Even knowledge and appreciation of the danger will not be sufficient to charge the servant with negligence when acting in obedience to a direct command unless he not only knows what is the risk to be encountered, but also that it will probably be attended with injury which he cannot void by the exercise of care and caution."

The common law rule is based upon the very nature of the principal-agent relationship and distinguishes the principal from the agent. The agent must obey the orders of his principal unless there is an all-compelling justification for non-compliance. Obedience to lawful orders of his superiors does not constitute contributory negligence on the part of the employee or assumption of risk of injury at common law.

Most accidents aboard ship occur when the seaman is acting under orders of a superior officer. If this decision of the Ninth Circuit Court of Appeals is permitted to stand, not only can it be used as a back-door device to saddle the injured seaman with the burden of fault under the "guise of contributory negligence", or more precisely compel the workman to assume the risk of harm from unseaworthy work-

ing conditions[7] (contrary to the public policy underlying both the Jones Act (46 U.S.C. § 688) and the General Maritime Law), but a harsher rule than that which exists at common law would be applied to seamen. In this regard, the decision of the Court below is believed to be erroneous and conflicting with decisions of this Court in *Socony Vacuum Oil Co. v. Smith* (1939) 305 U.S. 424, 59 S. Ct. 262, 83 L. Ed. 265, and with the Ninth Circuit's own decision in *Hudson Waterways Corporation v. Schneider* (9th Cir., 1966) 365 F. 2d 1012, holding that within reasonable limits the policy of the law favors merchant seamen and that the Court should not follow harsh common law principles regarding liability or contributory fault.

The situation presented in the instant case is clearly analogous to *Hudson Waterways Corporation, supra,* and *Socony Vacuum Oil Co., supra,* yet the Court of Appeals for the Ninth Circuit apparently has determined to frustrate furtherance of this policy by requiring a measure of conduct on the part of an injured seaman far greater than that required under common law.

The decision of the Court of Appeals for the Ninth Circuit on the issue of contributory negligence in this case should be reversed as contrary to the expressed policy of the Congress and the Courts in maritime cases most recently recognized by this Court, in

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[7]Cf: *Darlington v. National Bulk Carriers* (2nd Cir. 1946) 157 F. 2d 817.

Waldron v. Moore-McCormack Lines, Inc. (1967), 386 U.S. 724, 87 S. Ct. 1410, 18 L. Ed. 2d 482.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
August 21, 1967.

Respectfully submitted,
HUGH B. MILLER,
MARTIN J. JARVIS,
EUGENE A. BRODSKY,
JARVIS, MILLER & STENDER,
By MARTIN J. JARVIS,
Counsel for Petitioner.

(Appendices A, B and C Follow)